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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN CHRISTOPHER AUFMANN,

Defendant and Appellant.

D070106

(Super. Ct. Nos. SCD243925
and SCD246507)

APPEAL from an order of the Superior Court of San Diego County, David J.

Danielsen, Judge. Affirmed.

Law Offices of Russell S. Babcock and Russell S. Babcock, under appointment by the Court of Appeal for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant Brian Christopher Aufmann appeals from an order denying his petition for resentencing brought under Proposition 47 (Pen. Code,¹ § 1170.18). His appointed appellate counsel has filed a brief asking this court to independently review the record for

¹ All further statutory references are to the Penal Code.

error as mandated by *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2013 Aufmann entered a negotiated guilty plea to two counts of second degree burglary (§ 459 (counts 1 & 15)); grand theft of an automobile with a prior similar conviction (§§ 487, subd. (d)(1), 666.5, subd. (a) (count 3)); assault with a deadly weapon with personal use of a deadly weapon (§§ 245, subd. (a)(1), 1192.7, subd. (c)(23) (count 5)); and grand theft of personal property (§ 487, subd. (a) (count 10)). As part of the plea agreement, Aufmann admitted having served three prior prison terms (§ 667.5, subd. (b)) and having suffered one prior serious felony conviction (§ 667, subd. (a)).

Under the plea bargain, the remaining 24 counts and a strike allegation (§ 667, subds. (b)-(i)) were dismissed with a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754).

On January 6, 2014, the court sentenced Aufmann to a stipulated 15-year prison term: the four-year upper term on count 5; a consecutive one-year term (one-third the middle term) on count 3; consecutive eight-month terms (one-third the middle term) on counts 1, 10, and 15; one year for each prior prison term; and five years for the serious felony prior conviction.

On January 24, 2014, Aufmann appealed from the judgment. On March 7, 2015, while his appeal was pending, Aufmann filed a petition for resentencing under Proposition 47, asking the court to resentence the case then pending on appeal, as well as

six other cases spanning the years 1999-2008.² The record does not show the court took any action on this petition.

In April 2015 this court affirmed Aufmann's judgment of conviction in a nonpublished opinion. (*People v. Aufmann* (April 3, 2015, D065293).)

Subsequently, Aufmann again sought resentencing under Proposition 47. Aufmann's petition for resentencing is not in the record; however, the order denying Aufmann's petition, dated February 18, 2016, is in the record. The court denied relief on count 1 (second degree burglary) because "according to the change of plea form and the probation report, the burglary was a forced entry into a closed business to steal tools, and the loss was estimated in excess of \$1,000."³ The court denied relief on count 3 (grand theft, automobile) because according to the probation report, the vehicle theft was of a trailer worth approximately \$10,000 and inside the trailer were several all-terrain vehicles, collectively worth about \$8,000. The court denied relief under count 5 (assault with a deadly weapon) because assault with a deadly weapon is not eligible for relief under section 1170.18.⁴ The court denied relief under count 10 (grand theft, personal

² The six other cases listed in Aufmann's petition are: SCD212393 (May 2008); SCD186821 (April 2005); SCD161438 (October 2001); SCD146690 (September 1999); SCE198130 (August 1999); SCE197553 (June 1999).

³ According to the probation report, the estimated value of the stolen tools was \$5,000.

⁴ Section 1170.18, subdivision (a) provides: "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial

property) because the theft was for an amount greater than \$950. Regarding this count 10, the probation report states Aufmann stole electronics, tool chests, and BMW automobile wheels valued at approximately \$5,000, and Aufmann's guilty plea admits, "I stole property valued over \$950." The court denied relief on count 15 (second degree burglary) because according to the change of plea form and probation report, the entry was into a locked storage unit at the victim's townhouse, and Aufmann stole property worth approximately \$2,000. The last sentence of the court's order states, "The petition is denied without prejudice."

On March 29, 2016, Aufmann filed a notice of appeal "based on the February 18, 2016 denial of [section] 1170.18 and Prop[osition] 47 relief."

DISCUSSION

Proposition 47, codified in section 1170.18, reduced the penalties for a number of offenses. "Among those crimes are certain second degree burglaries where the defendant enters a commercial establishment with the intent to steal. Such offense is now characterized as shoplifting as defined in new section 459.5. Shoplifting is now a misdemeanor" unless the value of the items stolen exceeds \$950. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*).)

"Section 1170.18 creates a process where persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47,

court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act."

may petition for resentencing." (*Sherow, supra*, 239 Cal.App.4th at p. 879.) Section 1170.18, subdivision (b) provides in part: "Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a)." Under subdivision (b) of that statute, a person who satisfies the criteria in subdivision (a) of section 1170.18 shall have his or her sentence recalled and be sentenced to a misdemeanor (subject to certain exclusions not relevant here).

Aufmann's appellate counsel has filed a brief pursuant to *Wende, supra*, 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 (*Anders*), summarizing the proceedings below and indicating he was unable to find any reasonably arguable issues for reversal or modification of the order Aufmann challenges in this appeal.

Aufmann's counsel has identified the following issues that "might arguably support the appeal" (*Anders, supra*, 386 U.S. at p. 744): (1) Did the court err in deeming Mr. Aufmann ineligible for misdemeanor reduction relief under Proposition 47 (§ 1170.18), and (2) did the court err by not ruling on Aufmann's petition for misdemeanor reduction/resentencing relief under Proposition 47 as to cases SCD212393 (May 2008), SCD186821 (April 2005), SCD161438 (October 2001), SCD146690 (September 1999), SCE198130 (August 1999), and SCE197553 (June 1999)?

In September 2016 we notified Aufmann that his attorney "has filed a brief stating no arguable issues can be found" and we granted Aufmann 30 days to file a brief on his own behalf. Aufmann has not filed a brief on his own behalf.

Aufmann's first Proposition 47 petition was filed March 7, 2015, during the pendency of his appeal from his judgment of conviction in the instant case. However, the

trial court lacked jurisdiction to recall Aufmann's sentence and to resentence him pursuant to section 1170.18 while that appeal was pending. (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 929 [trial court lacks jurisdiction to recall a defendant's sentence and to resentence pursuant to section 1170.18 while an appeal from the judgment of conviction is pending].)

Moreover, Aufmann's first petition included no information other than case numbers of Aufmann's prior convictions. It was, therefore, deficient on its face. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 137 [petitioner's burden to provide factual basis of his claim regarding the value of the stolen property and other information "to aid the superior court in determining whether defendant is eligible for resentencing"]; *Sherow, supra*, 239 Cal.App.4th at p. 880 [petitioner fails to sustain his burden in a Proposition 47 petition that "gave virtually no information" regarding eligibility for resentencing, but merely "lumped all five counts together without discussion or analysis"].)

With respect to Aufmann's second petition under Proposition 47, the court's February 18, 2016 order denying Aufmann's petition is amply supported by the record.

Our review of the record pursuant to *Wende, supra*, 25 Cal.3d 436 and *Anders, supra*, 386 U.S. 738, including the issues identified by Aufmann's attorney, has disclosed no reasonably arguable appellate issues. Accordingly, we affirm the order. Aufmann's appellate counsel has competently represented him in this appeal.

DISPOSITION

The order entered February 18, 2016, denying Aufmann's petition under section 1170.18 is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.